



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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455 Capitol Mall, Suite 801
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OCT 9 2009

RE: MUR 6164
Economic Freedom Fund

Dear Mr. Bell:

On February 3, 2009, the Federal Election Commission notified your client, the Economic Freedom Fund, of a complaint alleging that your client may have violated certain sections of the Federal Election Campaign Act of 1971, as amended. On September 10, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe that the Economic Freedom Fund violated 2 U.S.C. § 441a by making excessive contributions based on allegedly coordinated communications. Accordingly, the Commission closed its file in this matter on October 1, 2009.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Michael Columbo, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Allen".

Mark Allen
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Economic Freedom Fund

MUR 6164

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by Brian L. Wolff, on behalf of the Democratic Congressional Campaign Committee. *See* 2 U.S.C. § 437g(a)(1).

II. INTRODUCTION

The complaint alleges that the Economic Freedom Fund ("EFF") coordinated communications with Mike Sodrel ("Sodrel"), the Friends of Mike Sodrel, Sodrel's principal campaign committee for his 2006 congressional campaign in Indiana's 9th Congressional District and Gregory M. Fitzloff, in his official capacity as treasurer ("FMS"). The allegedly coordinated communications involved robocalls advocating for the defeat of Baron Hill, Mike Sodrel's opponent in the 2006 general election. In support of the allegations, the complaint included phone records purportedly showing calls between individuals associated with FMS and EFF. *See* Complaint at Attachment A. The complaint alleges that EFF thereby made excessive contributions in violation of 2 U.S.C. § 441a. *See* Complaint at 4-5.

Based on the information provided in the complaint and response, there is a lack of information that would satisfy the coordinated communications test at 11 C.F.R. § 109.21, the Commission finds no reason to believe that the Economic Freedom Fund violated 2 U.S.C. § 441a through the making of excessive contributions to the Friends of Mike Sodrel.

III. FACTUAL AND LEGAL ANALYSIS

Mike Sodrel and Baron Hill have repeatedly challenged one another in elections for the seat in the House of Representatives representing Indiana's Ninth Congressional District. Complaint at 2. Hill first won election in 1998, successfully defended a challenge from Sodrel in 2002, lost to Sodrel in 2004, regained the seat in 2006, and, most recently, defeated Sodrel's challenge in 2008. *Id.*

The complaint alleges that EFF is a section 527 organization that sponsored "communications, including automated phone calls . . . that attacked Hill." *See* Complaint at 3. The complaint further alleges that Bud Bernitt, the founder and president of CFT, "called EFF during the 2006 campaign, when both Bernitt and EFF were mounting a negative campaign against Hill" and that this fact "suggests that Bernitt, acting on behalf of the Sodrel campaign, may have shared material information with EFF." *See* Complaint at 5. The complaint, however, includes no information about the alleged EFF automated phone calls and no information indicating that Bernitt had material information from the Sodrel campaign that he shared with EFF.¹

The complaint asserts that EFF coordinated its communications (robocalls) with Sodrel or FMA in 2006. The Act provides that expenditures by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents" constitute in-kind contributions to the candidate's authorized committee. 2 U.S.C. § 441a(a)(7)(B)(i). A payment for a coordinated

¹ Even assuming that the automated calls referenced in the complaint in MUR 6164 are the same as the calls addressed in MUR 5842 (Economic Freedom Fund), the Commission did not reach a majority decision in MUR 5842 as to whether the EFF phone calls expressly advocated the election or defeat of clearly identified candidates and closed the file. *See* MUR 5842 Statement of Reasons of Commissioners Peterson and Hunter and Statement of Reasons of Commissioners Bauerly and Weintraub.

1 communication must be reported as an expenditure made by that candidate's authorized
2 committee. 11 C.F.R. § 109.21(b)(1). In addition, as an in-kind contribution, the costs of a
3 coordinated communication must not exceed a political committee's applicable contribution
4 limits. *See* 2 U.S.C. § 441a.

5 To determine whether a communication is coordinated, 11 C.F.R. § 109.21 sets forth a
6 three-pronged test: (1) the communication must be paid for by a person other than a federal
7 candidate, a candidate's authorized committee, or any agent of either of the foregoing; (2) one or
8 more of the four content standards set forth in 11 C.F.R. § 109.21(c) must be satisfied; and (3)
9 one or more of the six conduct standards set forth in 11 C.F.R. § 109.21(d) must be satisfied. *See*
10 11 C.F.R. § 109.21(a).

11 EFF states in its response that the complaint is premised on a phone record indicating a
12 single phone call between Bernitt and "an unmonitored telephone number assigned to EFF" that
13 was listed on the EFF website. EFF Response at 1. EFF states that "Neither EFF nor any of its
14 former agents knows a Herman Bernitt" and "[n]either EFF nor any of its former agents 'shared'
15 any information with a Herman Bernitt." *Id.* EFF also noted that it had ceased making any
16 automated calls "of public interest to the citizens of Indiana" six days before the alleged call
17 from Bernitt to EFF. *Id.*

18 Based upon the speculative nature of the allegations as to the coordination between the
19 Economic Freedom Fund and Sodrel or the Friends of Mike Sodrel, the Commission finds no
20 reason to believe that the Economic Freedom Fund made excessive in-kind contributions in
21 violation of 2 U.S.C. § 441a. *See* MUR 4960 (Hillary Rodham Clinton for U.S. Senate)
22 Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith,

1 and Scott E. Thomas (purely speculative allegations accompanied by a direct refutation do not
2 form an adequate basis to find reason to believe that a violation of the Act occurred).

3 V. CONCLUSION

4 The Commission finds no reason to believe that the Economic Freedom Fund made
5 excessive in-kind contributions in violation of 2 U.S.C. § 441a.